No. 89-1264

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CROWN CORK & SEAL CO., INC.,

Petitioner,

v.

ELIZABETH MCNASBY, CATHERINE BERES, HENRIETTA ELLIOTT, MARGARET FELMEY, ANN JACYSZYN, VIRGINIA KNOWLES, LORRAINE MASON, EDITH MCGRODY, BETTY (PONATH) MOYER, JOAN MURPHY, ELEANOR NEYER, MARIE PEKALA and DORIS YOCUM, on behalf of themselves and all others similarly situated,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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COUNTER STATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

1. SHOULD THE COURT REVIEW A DETERMINATION OF PENNSYLVANIA LAW MADE BY THE COURT OF APPEALS FOR THE THIRD CIRCUIT, WITHOUT DISSENT, WHERE THE COURT OF APPEALS' DECISION IS CONSISTENT WITH PRIOR DECISIONS OF PENNSYLVANIA APPELLATE COURTS AND THERE ARE NO MORE RECENT CONTRARY DECISIONS BY THOSE COURTS?

2. SHOULD THIS COURT CONSIDER WHETHER THE FULL FAITH AND CREDIT ACT, 28 U.S.C. §1738, OR TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, REQUIRE OR PERMIT THE APPLICATION OF CLAIM PRECLUSION BASED UPON PRIOR PROCEEDINGS UNDER THE PENNSYLVANIA HUMAN RELATIONS ACT EVEN WHERE PENNSYLVANIA COURTS WOULD NOT APPLY CLAIM PRECLUSION?

3. SHOULD THIS COURT CONSIDER WHETHER THE EXCLUSIVITY PROVISION OF THE PENNSYLVANIA HUMAN RELATIONS ACT DENIED PETITIONER EQUAL PROTECTION OF THE LAWS BECAUSE IT APPLIES CLAIM PRECLUSION TO SUBSEQUENT ACTIONS ARISING UNDER STATE LAW, BUT DOES NOT APPLY CLAIM PRECLUSION TO SUBSEQUENT ACTIONS ARISING UNDER FEDERAL LAW?

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COUNTER STATEMENT OF THE CASE

1. The suggestion at page 4 of the Petition that Mrs. McNasby had "private counsel" who participated in the proceedings before the Pennsylvania Human Relations

Commission ("PHRC"), is not correct. Under the Pennsylvania Human Relations Act ("PHRA"), as it existed before 1982 (*see* Act 1982-47 (approved December 9, 1982), Laws of Pennsylvania, Session of 1982, at 1053, 1054-55.) Mrs. McNasby could not have private counsel litigate her claim before the PHRC. When, following the PHRC's issuance of its Proposed Findings of Fact and Conclusions of Law in 1981, Mrs. McNasby obtained counsel, and requested reconsideration, the PHRC did not ever rule on that request, nor respond to counsel's request for an opportunity to brief and argue certain issues. Moreover, the PHRC's Supplementary decision did not even mention Mrs. McNasby's counsel's request for reconsideration, or any of the issues her counsel sought to raise. *See McNasby v. Crown Cork & Seal Co., Inc.*, 656 F. Supp. 206, 208 (E.D. Pa. 1987).

2. The district court first granted Mrs. McNasby's motion for partial summary judgment and denied Petitioner's motion for summary judgment. *Id.* Petitioner appealed to the Court of Appeals For The Third Circuit, which dismissed the appeal. *McNasby v. Crown Cork & Seal Co., Inc.*, 832 F.2d 47 (3d Cir. 1987), *cert. denied, Crown Cork & Seal Co., Inc. v. McNasby,* ____ U.S. ____, 99 L.Ed.2d 273 (1988).

REASONS FOR DENYING THE WRIT

ARGUMENT

I. REVIEW OF THE DECISION OF THE COURT OF APPEALS OF THE THIRD CIRCUIT INTERPRETING PENNSYLVANIA LAW IS NOT WARRANTED UNDER ANY PRINCIPLE PREVIOUSLY ENUNCIATED BY THIS COURT.

A. Introduction

Petitioner's efforts to persuade the court of appeals to apply a special rule of preclusion to the Pennsylvania Human Relations Act (43 Pa. Cons. Stat. Ann. §951, §962(b) ["PHRA"]) different from that applied to other causes of action by Pennsylvania courts, failed despite liberal marbling of its arguments in that court with personal attacks on Respondent's counsel. Now faced with the historical reluctance of this Court to review interpretations of local law by the courts of appeals, *see Bishop v. Wood,* 426 U.S. 341, 345-47 (1976), Petitioner chooses to cast aspersions on the court of appeals, accusing it of "evading" its duty (Petition at 9), "manufactur[ing]" and "creat[ing] legislative intention," (*Id.* at 12, 14) and "distort[ing]" and "invent[ing] a jurisdictional competency exception to Pennsylvania claim preclusion law." (*Id.* at 15). In truth, the court of appeals' interpretation of Pennsylvania preclusion law is consistent with applicable statutory language, analogous Pennsylvania common law decisions, the majority rule among the states, the Restatement (Second) of Judgments, logic and sound public policy.

The court of appeals' opinion was authored by the Honorable Edward R. Becker. Judge Becker has been a Judge of the United States Court of Appeals for the Third Circuit since 1981, following eleven (11) years on the United States District Court for the Eastern District of Pennsylvania, and a career as a practicing attorney in Philadelphia. 2 Almanac of The Federal Judiciary, 3d Circuit 3 (Prentice Hall Law & Business 1989). His colleagues on the

panel that heard the case and joined in his opinion were Judge Walter K. Stapleton[1] and Senior Judge Max Rosenn.[2] It is revealing that Petitioner sees fit to resort to an intemperate and unjustified attack on these judges, and by inference, on the other members of the court of appeals, who voted without public dissent to deny the Petition For Rehearing and Rehearing *En Banc*.[3] As will be shown below, the court of appeals was correct.

B. This Court should not review the decision below because it rested on the sound application of Pennsylvania law derived from a reasonable reading of existing state appellate court decisions.

Preclusion under the Full Faith Credit Statute, 28 U.S.C. §1738, upon which Petitioner relied in its motion for summary judgment, and in its briefs below, depends upon the scope of the preclusive effect that would be given to the judgment upon which preclusion is premised by the courts

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1. Judge Stapleton was appointed to the United States Court of Appeals for the Third Circuit in 1985, after serving fifteen (15) years on the United States District Court for the District of Delaware. 2 Almanac of the Federal Judiciary, 3d Circuit 6 (Prentice Hall Law & Business 1989)

2. Judge Rosenn has been a member of the United States Court of Appeals for the Third Circuit since 1970. Previously, he was in private practice in Pennsylvania for more than thirty years and served as Chair of the Pennsylvania Human Relations Commission. *Id.* at 3d Circuit 12.

3. Among the active Judges of the United States Court of Appeals for the Third Circuit considering the motion were several judges with extensive experience in applying Pennsylvania law even before being appointed to the court of appeals. *E.g.*, Judge A. Leon Higginbotham, Jr. served on the United States District Court for the Eastern District of Pennsylvania from 1964 until 1967; Judge Carol Los Mansmann served on the United States District Court for the Western District of Pennsylvania from 1982 to 1988; Judge Anthony J. Scirica served on the United States District Court for the Eastern District of Pennsylvania and the Court of Common Pleas of Montgomery County, Pennsylvania; and Judge William D. Hutchinson, served as Associate Justice, Pennsylvania Supreme Court from 1982 to 1987. *Id.* at *passim.*

of the state rendering that decision. *Marrese v. American Academy of Orthopaedic Surgeons,* 470 U.S. 373 (1985).

In reversing the district court's opinion below, the court of appeals carefully analyzed the preclusion law of Pennsylvania, which it has been called upon to consider frequently in recent years. *E.g., McCarter v. Mitcham,* 883 F.2d 196, 199-201 (3d Cir. 1989) (claim preclusion); *Kelley v. TYK Refractories, Inc.,* 860 F.2d 1188, 1193-98 (3d Cir. 1988) (issue preclusion); *Gregory v. Chehi,* 843 F.2d 111, 117 (3d Cir. 1988) (claim preclusion); *Davis v. U.S. Steel Supply,* 688 F.2d 166, 170 (3d Cir. 1982) *(en banc), cert. denied,* 460 U.S. 1014 (1983) (claim preclusion). *C.f., Nanavati v. Burdette Tomlin Memorial Hospital,* 857 F.2d 96 (3d Cir. 1988), *cert. denied,* ____ U.S. ____, 103 L.Ed.2d 834 (1989) (claim preclusion, applying New Jersey law).

Given the experience of the United States Court of Appeals for the Third Circuit in analyzing the manner in which the state courts within its circuit apply their own preclusion law, and particularly the manner in which the Pennsylvania law would be decided, its decision in this case on that issue must be given great deference, and not re-examined unless it is entirely untenable. *Bishop,* 426 U.S. at 345-47.

C. The court of appeals' interpretation of section 962(b) of the Pennsylvania Human Relations Act was correct.

1. Section 962(b) does not purport to preclude or otherwise relate to actions arising under federal law.

In *Lukus v. Westinghouse Electric Corp.,* 276 Pa. Super. 232, 419 A.2d 431 (1980), a nearly unanimous,[4] *en banc,* decision of the Pennsylvania superior court,[5]

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4. The only judge who did not join in the majority opinion, Judge Van Der Voort, concurred in the result without filing a separate opinion.

5. The Pennsylvania superior court is an intermediate appellate court of general, state-wide jurisdiction. 42 Pa. Cons. Stat. Ann. §742. Because

(footnote continued on next page)

defendant sought to preclude litigation of a claim under the PHRA in state court, based upon the plaintiff's prior commencement and voluntary dismissal of a Title VII claim in federal court arising out of the same facts and circumstances. The superior court affirmed the dismissal of defendant's preliminary objections, holding that section 962(b) of the PHRA was not intended to "address the relationship between the PHRA and federal discrimination laws . . . ." *Id.* at 269, 419 A.2d at 451.

The court of appeals relied, in part, on this holding in *Lukus.* Petitioner, on the other hand, deftly attempts to ignore *Lukus,* preferring to fashion, without any citation of authority, its own theory of the legislative purpose of section 962(b). (Petition at 12-13)

Petitioner's arguments that section 962(b) is designed to promote efficiency and expertise in the Pennsylvania Human Relations Commission ("PHRC") (Petition at 12), and to conserve state resources by requiring that a claimant proceed in only one state forum (Petition at 13) are irrelevant. Assuming, without agreeing with Petitioner's unsupported hypothesis, that Petitioner is correct, neither policy is undermined by the superior court's interpretation of section 962(b) in *Lukus,* or by the decision of the court of appeals below.[6]

(footnote continued from preceding page)

the Pennsylvania Supreme Court's appellate jurisdiction in civil cases is very narrowly confined with respect to appeals as of right, *Id.* at §722, the remainder of its civil appellate jursidiction being subject to discretionary review pursuant to Petition For Allowance of Appeal, *Id.* at §724, the superior court is the highest court in which the vast majority of civil cases are heard.

6. Equally probable, given the difference between Title VII's requirement that victims of discrimination are entitled to "make whole relief", Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), and the virtually unreviewable discretion vested by the PHRA in the PHRC to fashion a remedy that best serves the public interest, Murphy v. Commonwealth of

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The PHRC's jurisdiction is narrowly circumscribed by its enabling legislation. *Murphy v. Commonwealth of Pennsylvania Human Relations Commission,* 506 Pa. 549, 556-57, 486 A.2d 388, 392, *appeal dismissed,* 471 U.S. 1132 (1985); *Pennsylvania Human Relations Commission v. St. Joe Mineral Corp.,* 476 Pa. 302, 310, 382 A.2d 731, 735-36 (1978) (concerning the power of the PHRC: "A doubtful power does not exist"). Under the PHRA, the Commission is given jurisdiction only with respect to claims arising under the PHRA — not those arising under Title VII. 43 Pa. Cons. Stat. Ann. §956. (Purdon Supp. 1989). Thus, permitting a proceeding under Title VII of the Civil Rights Act of 1964 after the PHRC has had an opportunity to investigate, conciliate and adjudicate the complaint brought under the PHRA will have no adverse impact on the evolution of law under the PHRA, nor on the development or maintenance of the Commission's expertise. Indeed, Pennsylvania courts have charted their own course in applying the PHRA, reaching results different from those compelled by Title VII. *Compare Anderson v. Upper Bucks County Area Vocational School,* 30 Pa. Commw. 103, 373 A.2d 126 (1977) *with General Electric Corp. v. Gilbert,* 429 U.S. 125 (1976). Similarly, permitting a subsequent lawsuit in federal court under federal law can have no impact upon the integrity of state law, *C.f., Thomas v. Washington Gas Light Co.,* 448 U.S. 261, 281, 283-84 (1980), the expertise of the PHRC or the burden on scarce state resources.

(footnote continued from preceding page)

Pennsylvania Human Relations Commission, 506 Pa. 549, 559, 486 A.2d 388, 393 (1985), is the inference that the Pennsylvania Legislature and the superior court believed that the PHRC was not an appropriate forum in which to assure that the policy of the federal law would be carried out. *C.f.,* Thomas v. Washington Gas Light Co., 448 U.S. 261, 281-82 (1980).

Conversely, the interpretation of section 962(b) suggested by Petitioner would not effect any saving of scarce judicial resources, but at best merely alter the sequence in which proceedings would be brought.

Because Section 962(b) does not preclude bringing a claim arising under the PHRA *after* litigation of a claim arising under Title VII, *Lukus,* 276 Pa. Super. at 269, 419 A.2d at 451, the result advocated by Petitioner would counsel victims of discrimination to pursue their Title VII claims *before* resorting to state law remedies. This is directly contrary to the structure laid out by Congress in Title VII.[7] Of course, 28 U.S.C. §1738 rather than the PHRA is the source of whatever preclusive effect is required here. But, because section 962(b) of the PHRA does not preclude subsequent litigation of any federal claim based on the prior litigation under the PHRA — as the superior court suggested in *Lukus*[8] — then section 1738 will not preclude that claim. *Marrese v. American Academy of Orthopaedic Surgeons.*

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7. Moreover, even if state courts have concurrent jurisdiction over suits arising under Title VII, the potential burden on state courts would be greater. Complaints under the PHRA must be brought before the PHRC. Clay v. Advanced Computer Applications, Inc., ___ Pa. ___, 559 A.2d 917 (1989). Appeals from decisions of the PHRC, must go to the Commonwealth Court, whose jurisdiction is limited in such cases to review of that which was actually before the PHRC. 42 Pa. Cons. Stat. Ann. §761-763 (Purdon Supp. 1989). *See also* Kusnir v. Leach, 64 Pa. Commw. 65, 70, 439 A.2d 223, 226 (1982); Placid v. Unemployment Compensation Board of Review, 58 Pa. Commw. 250, 255, 427 A.2d 748, 750 (1981). Thus, if section 962(b) purported to impose claim preclusion on subsequent Title VII actions based upon a decision under the PHRA, a complainant desiring to pursue both state and federal claims would have to pursue them in separate proceedings, thereby increasing the burden on state courts.

8. Section 962(b) precludes actions under the PHRA based on prior actions in other courts, and precludes other actions based upon prior proceedings under the PHRA. The superior court, in *Lukus,* however, held that a prior Title VII action does not preclude a subsequent action under

(footnote continued on next page)

2. Pennsylvania may, and does, interpret its Human Relations Act differently from the interpretation applied by other states to similar language in their civil rights statutes.

The heart of Petitioner's argument is its assumption that, in *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982), this Court held that the New York Executive Law, Section 300 (McKinney 1972), whose language is substantially the same as that of section 962 of the PHRA, requires claim preclusion. Petitioner, however, overreads *Kremer.* It must also be noted that the question of whether New York courts would interpret section 300 to require claim preclusion or issue preclusion was not at issue in *Kremer.* Rather, if either claim or issue preclusion applied at all it would have precluded Kremer's Title VII action. 456 U.S. at 280-281. The Court in *Kremer* was thus not faced with the argument that the state statute at issue itself differentiated in its preclusive effect between federal claims and state claims.

Even if Petitioner's assumption is correct, the court of appeals below properly ruled that New York's interpretation of its statute "does not bind us to conclude that Pennsylvania would interpret its similar statute similarly . . . ." *McNasby v. Crown Cork & Seal Co., Inc.*, 888 F.2d 270, 280 (3d Cir. 1989).

Petitioner acknowledges that "virtually identical language might be construed differently by courts of different states." (Petition at 10). Indeed, *Lukus'* holding to this effect is not unique in Pennsylvania's application of its Human Relations Act. Pennsylvania has demonstrated its willingness to disregard the interpretations by courts of other states of language similar to that of the PHRA in the equal rights

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the PHRA because the other actions referred to in section 962 are only actions arising under Pennsylvania law, not federal law. *Lukus,* 276 Pa. Super. at 269, 419 A.2d at 451.

statutes of those states. *C.f., Zamantakis v. Pennsylvania Human Relations Commission,* 10 Pa. Commw. 107, 116-117, 308 A.2d 612, *aff'd,* 478 Pa. 454, 307 A.2d 70 (1978) (holding that compensatory damages are not available under the PHRA, although they are available under the New Jersey statute whose language is similar: "Admittedly, the New Jersey statute is similar to ours, and is silent on damages. However, in the case of *Zahorian v. Russell Fitt Real Estate Agency,* 62 N.J. 399, 301 A.2d 754 (1973) cited by our Commission, the majority opinion refers to 'minor or incidental awards' justified by the evidence. We find the New Jersey result to be confusing and unacceptable under the Pennsylvania statute").

3. Pennsylvania's common law of preclusion would not apply claim preclusion to prevent litigation of Respondent's Title VII claim because no adjudicatory body in Pennsylvania in which the Respondent litigated her claims under the PHRA ever had jurisdiction over her Title VII claim.

The court of appeals found that under the common law of Pennsylvania, where the court first hearing a dispute does not have subject matter jurisdiction over a claim raised in a subsequent case, the former adjudication will not be given claim preclusive effect over the latter. *McNasby,* 888 F.2d at 276-77. Petitioner fails to cite a single Pennsylvania decision in support of its assertion that the court of appeals misapplied Pennsylvania's common law of preclusion. (Petition at 15-17). Far from engaging in "independent law making," (Petition at 15), the court of appeals determined that Pennsylvania follows what had been referred to as a rule of "nearly universal" application. *McCarter v. Mitcham,* 883 F.2d 196, 199 (3d Cir. 1989). *See also Eichman v. Fotomat Corp.,* 759 F.2d 1434, 1437 (9th Cir. 1985). *C.f., Marrese,* 470 U.S. at 382; *Nanavati,* 857 F.2d at 112; Restatement (Second) of Judgments §26.

Pennsylvania courts have consistently applied the very rule applied by the court of appeals below. *See, City of Philadelphia v. Stradford Arms, Inc.*, 1 Pa. Commw. 190, 195, 274 A.2d 277, 280 (1971); *Ostroff v. Yaslyk*, 204 Pa. Super 66, 69, 203 A.2d 347 (1964), *rev'd on other grounds*, 419 Pa. 183, 213 A.2d 272 (1965). *C.f., McCarter*, 883 F.2d 196 (3d Cir. 1989); *Kelley*, 860 F.2d at 1196 n.14; *BMY v. Commonwealth of Pennsylvania Unemployment Compensation Board of Review*, 94 Pa. Common. 579, 588, 504 A.2d 946, 951 (1986).

Proceedings in this case began before the PHRC which only has subject matter jurisdiction over complaints arising under the PHRA. Respondent's appeal from the decision of the PHRC went, as required, directly to the commonwealth court. The commonwealth court's jurisdiction was, and is, limited to questions arising out of matters actually considered by the PHRC.[9] *See Kusnir*, 64 Pa. Commw. at 70, 439 A.2d at 226; *Placid*, 58 Pa. Commw. at 255, 427 A.2d at 750. Thus, the commonwealth court did not have subject matter jurisdiction over Respondent's Title VII claims. Similarly, the Pennsylvania Supreme Court never had jurisdiction over Respondent's Title VII claims, either as a matter of its original or appellate jurisdiction. *See* 42 Pa. Cons. Stat. Ann. §721-724 (Purdon 1981). Thus, as a matter of state law, no state adjudicatory body that considered this case ever had subject matter jurisdiction over Respondent's claims arising under Title VII. Therefore, Respondent's Title VII claims could not have been raised and adjudicated in the prior state court proceedings. Consequently, the decisions of the PHRC, the commonwealth court and the Pennsylvania Supreme Court in the prior action, would not have

9. The commonwealth court's original jurisdiction would likewise not have encompassed Respondent's Title VII claims because they would not have been brought by or against the Commonwealth of Pennsylvania. 42 Pa. Cons. Stat. Ann. §761 (Purdon 1981). *See also* Pennsylvania Department of Aging v. Lindberg, 503 Pa. 423, 469 A.2d 1012 (1983).

been given claim preclusive effect by any other Pennsylvania court if Respondent's Title VII claims were thereafter brought in state court.[10]

II. THIS CASE IS SINGULARLY INAPPROPRIATE AS A VEHICLE TO ADVANCE THE NOVEL THEORY THAT SECTION 1738 AND TITLE VII REQUIRE BROADER PRECLUSION THAN THAT PROVIDED BY THE LAW OF PENNSYLVANIA.

A. The language and purpose of section 1738 require that the preclusive effect be the same as that applied by state law.

Throughout this litigation, Petitioner has premised its arguments upon its interpretation of state law. Only after the court of appeals finally rejected Petitioner's argument did Petitioner change its tack and argue for the first time that section 1738 or Title VII require rejection of Pennsylvania's preclusion rules and the creation of a broader federal rule.[11] Its new argument is as unpersuasive as was the earlier one. Section 1738 is quite explicit that the full faith and credit given to such prior state judicial precedings is to be "the same . . . as they have by law or usage in the courts of such state . . . ." 28 U.S.C. § 1738. This Court held in

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10. *A fortiori,* if, as a matter of federal law, state courts do not have subject matter jurisdiction of claims arising under Title VII, *c.f.* Bradshaw v. General Motors Corp., 805 F.2d 110 (3d Cir. 1986), Pennsylvania courts would not apply claim preclusion here. *But c.f.,* Yellow Freight System, Inc. v. Donnelly, No. 89-431, 1989 Oct. Term (argued February 28, 1990). Petitioner's argument that Mrs. McNasby must be claim precluded because Title VII jurisdiction is concurrent and because she could have filed a Title VII suit in the Court of Common Pleas, is absurd. That logic would lead to the conclusion that states have virtually exclusive jurisdiction over Title VII claims. Moreover, no provision of Title VII or of section 1738 requires claimants to pursue remedies available to them in state courts. *See Kremer,* 456 U.S. at 469.

11. This argument was first raised by Petitioner in its Petition for Rehearing in the court of appeals.

Marrese that the language of section 1738 means just what it says, "the same" — no more and no less. Moreover, the purpose of full faith and credit, to give proper respect and deference to the judicial proceedings of the states, is best served when the federal courts apply the "same" rules of preclusion as would be applied by other state courts.

Title VII is a particularly inappropriate statute on which to attempt to engraft a broader rule of preclusion than that provided in section 1738. The legislative history of Title VII makes abundantly clear that the members of congress expected Title VII issues to be litigated in federal courts before federal judges.[12] This Court, of course, held in *Kremer,* that that intent was subject to the mandate of section 1738. Nevertheless, it would be anomalous, having found that applying section 1738 to Pennsylvania preclusion law does not result in precluding Respondent from having her Title VII claims heard in federal courts before

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12. *See, e.g.,* Representative McCullouch on the question of whether administrative agencies or courts should be responsible for enforcement: "A substantial number of committee members . . . preferred that the ultimate determination of discrimination rest with the Federal judiciary . . . ." H.R. Rep. 914, 88th Cong., 1st Sess., *reproduced in* 1964 Leg. Hist. at 2150; Senator Cotton: "[T]he process will lead to one place — the door of the Federal Court." *Id.* at 3308. "[O]rdinarily, a suit will be brought in a Federal district court . . . . [T]he party allegedly discriminated against may . . . bring his own suit in Federal court . . . . The suit against the respondent, whether brought by the Commission or by the complaining party, would proceed in the usual manner for litigation in the Federal Courts." Interpretive Memorandum of Senators Clark and Case, *Id.* at 3044. Similarly, when Congress considered a series of amendments to Title VII in 1972, which became the Equal Employment Opportunity Act of 1972, the members of both Houses assumed exclusive federal jurisdiction over Title VII actions. E.g., Representative Erlenborn: "My bill would require any case to be tried [in the Federal District Courts]". Leg. Hist. at 249; Speaker Albert: "[T]he protection of the principles of justice requires that these cases be heard only in Federal courts." *Id.* at 261; Senator Dominick: "In the district courts where under the Dominick amendment [defeated, but later revised and adopted], suits would have to be filed . . . ." *Id.* at 905. *C.f.,* Alexander v. Gardner-Denver Co., 415 U.S. 36, 45, 47-49 (1974).

federal judges, to create, out of whole cloth, a broader rule of preclusion just for Title VII claims.[13]

Moreover, this case is a particularly inappropriate vehicle for engaging in such an effort. It is clear, that on the key issue of discrimination, after a lengthy hearing the PHRA concluded that the Petitioner engaged in a blatant pattern and practice of invidious discrimination which inured to the great harm of plaintiffs.[14] Only because of the peculiarities of state law, and the handling of the case by the staff of the PHRC was Mrs. McNasby deprived of make whole relief,

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13. When this Court did consider the question of the preclusive effect of a prior state proceeding not covered by Section 1738, i.e. decisions of state administrative agencies acting in a judicial capacity, it ruled that "traditional principles" or "general rules" of preclusion would apply. In so doing, the Court held that issue preclusion, not claim preclusion, properly served both the interests of federalism and the need for finality. University of Tennessee v. Elliott, 478 U.S. 288, 796-99 (1986). *C.f.,* Thomas v. Washington Gas Light Co., 488 U.S. 261 (1980); Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974). Thus, even if the Court were to accept Petitioner's invitation to reject the court of appeals' application of Pennsylvania law, and hold that Pennsylvania law is not dispositive as to whether claim or issue preclusion applies here, it is likely that the result would be precisely that which flows from the decision of the court of appeals — the application of issue preclusion, not claim preclusion based upon the prior state proceedings.

14. At the conclusion of its more than 130 Findings of Fact the PHRC concluded that the record revealed that Petitioner was guilty of one of the "most blatant patterns of discriminatory employment practices that has ever been brought to this Commission's attention . . . all operating to the detriment of women employees." The PHRC found specifically, that Petitioner "engaged in a pattern and practice of discrimination based upon sex, female, of applicants and employees in hiring, job assignment, job transfer, compensation layoff and recall from layoff, on a continuing basis . . ." and operated a sex-segregated job-classification and seniority system. Interestingly, Petitioner has never challenged the accuracy of these findings. McNasby v. Crown Cork & Seal Co. Inc., 832 F.2d 47, 48 (3d Cir. 1987).

and were the remaining parties deprived of all relief.[15] Indeed, the application of a rule of preclusion broader than that required by Section 1738 in this case would fly in the face of this Court's decision in *New York Gaslight Club v. Carey,* 447 U.S. 54 (1980). In *New York Gaslight Club* this Court acknowledged, *inter alia,* that Title VII was intended as a supplement to state law, and held that in a subsequent Title VII action in federal court, plaintiff could obtain a remedy beyond the relief obtained in prior proceedings under state law. *C.f., Gardner-Denver,* 415 U.S. at 47-49.

B. Petitioner's contention that an aberrant preclusion rule be imposed upon Title VII cases contradicts an unbroken line of cases, including those of this Court, applying the full faith and credit Statute, 28 U.S.C. §1738, as well as this Court's Opinion in Kremer v. Chemical Construction Corp.

This Court held in *Kremer:*

> It has long been established that §1738 *does not* allow federal courts to employ their own rules of *res judicata* in determining the effect of state judgments. Rather, it

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15. Mrs. McNasby was denied the full measure of back pay to which she would be entitled under Title VII by the PHRC's, essentially unreviewable, discretionary decision to award back pay starting with the date on which she filed her complaint of discrimination, rather than from the date the discriminatory acts of Petitioner began to affect her pay adversely; and by the PHRC's staff's unilateral decision to reserve litigation of post-1975 damages until after the PHRC had decided the liability issues. The remaining parties were denied relief because they were relying on the Commission's staff to protect their rights; but the class action complaint filed by the staff failed to comply with Pennsylvania pleading rules and was not amended until after the statute of limitations had run on the claims. The Pennsylvania Supreme Court held that the amendment did not relate back to the filing of the original complaint. Murphy v. Commonwealth of Pennsylvania Human Relations Commission, 506 Pa. 549, 486 A.2d 388 (1985). *See also, McNasby,* 656 F. Supp. at 208.

> goes beyond the common law and commands a federal court to accept the rules chosen by the state from which the judgment is taken.

456 U.S. at 481-82. In *Marrese v. American Academy of Orthopaedic Surgeons,* 470 U.S. 373, 380 (1985), this Court stated, "[s]ection 1738 embodies concerns of comity and federalism that allow the states to determine, subject to the requirements of the statute and the due process clause, the preclusive effect of judgments in their own courts." *See also, Migra v. Warren City School Dist. Bd. of Educ.,* 465 U.S. 75 (1984).

Petitioner asks this Court to create an exception to its decisional law regarding section 1738, *Elliott, supra; Parsons Steel, Inc. v. First Alabama Bank,* 474 U.S. 518 (1986); *Marrese, supra; Migra, supra; Haring v. Prosise,* 462 U.S. 306 (1983); *Kremer, supra; Allen v. McCurry,* 449 U.S. 90 (1980); *Thomas v. Washington Gas Light Co.,* 448 U.S. 261 (1980), and declare a special federal doctrine of preclusion applicable to this Title VII action on the basis of its assertion that Pennsylvania preclusion law is unclear. To so hold, however would require throwing aside both the instruction in *Marrese* that "an exception to §1738 will not be recognized unless a later statute contains an express or implied repeal." 470 U.S. at 381, *quoting from Kremer* 456 U.S. at 468; the holding of *Kremer* that "Title VII does not repeal §1738, either expressly or impliedly," 456 U.S. at 468; and the rule that federal courts may not give "greater preclusive effect to a state court judgment then state court would give to Petitioner." *Marrese,* 470 U.S. at 388 (Burger C.J., concurring) *citing Migra v. Warren City School District Board of Education,* 465 U.S. 75 (1984).

Because no controlling precedent permits such an argument, Petitioner relies upon the concurring opinion of former Chief Justice Burger in *Marrese* for the proposition that "when state law is indeterminate or ambiguous, a clear federal rule would promote substantive interests as well." 470

U.S. at 390. In *Marrese,* however, *no* Illinois court had decided whether a state antitrust claim would have preclusive effect on a federal antitrust action arising out of the same facts as did the state law claim. Therefore, the Illinois preclusion law was, in fact, indeterminate, and Chief Justice Burger expressly so noted. *Id.* at 287.

The court of appeals in this case, however, found that not only has Pennsylvania considered the express interrelationship of section 962(b) of the PHRA and Title VII, *see Lukus v. Westinghouse Elec. Corp.,* 276 Pa. Super 232, 419 A.2d 431 (1980), but it has determined that the exclusivity provisions of the PHRA have no bearing on parallel Title VII proceedings. *McNasby,* 888 F.2d at 280-81. Moreover, the court of appeals also found that there is a common law of preclusion in Pennsylvania which is consistent with its interpretation of section 962(b). *Id.* at 276-78. The applicability of Pennsylvania law is clear, and thus Chief Justice Burger's suggestion of what might be done where the law is indeterminate is of no moment.

Finally, Petitioner argues that there "is a federal interest in the uniform treatment of Title VII claims of different states." Its principal authority[16] for this proposition is a law review article, Burbank, *Interjurisdictional Preclusion, Full*

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16. The reference to Shreve, Preclusion and Federal Choice of Law, 64 Tex. L. Rev. 1209, 1255-56 (1986), is certainly the triumph of hope over reality. The legislative history of Title VII contains repeated comments from Senators and Representatives of both parties recognizing the importance of the right to a trial in federal court. *C.f.* Elliott, 478 U.S. at 795-96; *Gardner-Denver,* 415 U.S. at 45, 47-49. *See, supra* note 12 and accompanying text. There is, quite literally, no basis for suggesting a broader rule of preclusion for Title VII cases than that mandated by Section 1738 and applicable state law. If any thing, the legislative history of Title VII suggests the narrowest possible application of preclusion. 415 U.S. at 45, 47-49.

Faith and Credit and Federal Common Law, A General Approach, 71 Cornell Law Rev. 733 (1986).[17] Professor Burbank theorizes that the decisions of this Court in *Parsons Steel, Marrese, Migra, Haring, Kremer* and *Allen* are wrong because no state court will ever be called upon to decide whether claim preclusion arises from its parallel civil rights acts to preclude subsequent Title VII actions and that therefore, a preclusion doctrine imposed by the federal courts will support a general and allegedly more efficient, resolution of cases. Professor Burbank's theory, however, fails to recognize the fact that in addition to cases such as *Lukus,* which do consider the applicability of the state's preclusion rules to employment discrimination cases arising under both federal and a state law, Pennsylvania as well as other states have general rules of preclusion which guide the courts in this application to specific cases. Thus, there is no justification for this Court to ignore all of its decisions applying section 1738, and superimpose onto this proceeding a special federal preclusion law.

III. THE COURT OF APPEALS' DECISION INTERPRETING SECTION 962(b) DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

Petitioner's "last resort"[18] is to urge that this Court grant its petition, and consider, after full briefing and argument, whether section 962(b) of the PHRA, as interpreted by the Superior Court of Pennsylvania in *Lukus* and the

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17. Professor Burbank was counsel for Petitioner in the Court of Appeals, and when Petitioner filed its prior Petition for a Writ of Certiorari, Crown Cork & Seal Co., Inc. v. McNasby, No. 87-1198, 1987 Oct. Term.

18. Petitioner's argument does call to mind, Mr. Justice Holmes' reference to allegedly improper classification as "the usual last record of constitutional arguments." Buck v. Bell, 274 U.S. 200, 208 (1927).

court of appeals below, violates the Equal Protection Clause of the Fourteenth Amendment.

> Unless a statute provokes strict judicial scrutiny because it interferes with a 'fundamental right' or discriminates against a 'suspect class,' it will ordinarily survive an equal protection attack so long as the challenged classification is rationally related to a legitimate governmental purpose.

Kadrmas v. Dickinson Public Schools, ___ U.S. ___, 101 L.Ed.2d 399, 409 (1988). Petitioner apparently concedes that the classification allegedly created by section 962(b) of the PHRA does not interfere with a "fundamental right" nor discriminate against any "suspect class." Petition at 24-25. Thus, Petitioner must carry the heavy burden of demonstrating that the statute, as interpreted "is both arbitrary and irrational." *Id.* at ___, 101 L.Ed.2d at 422.

Nevertheless, Petitioner argues that the only legitimate governmental interest would be preventing duplicative litigation. Even if that were so, that interest is well served by section 962(b)'s non-inclusion of federal claims.[19] Moreover, the fact that the PHRC's jurisdiction is limited to the enforcement of the PHRA, the additional fact that the PHRA (unlike Title VII) encompasses discrimination in, *e.g.,* housing and public accommodations, as well as employment 43 Pa. Cons. Stat. Ann. §951 *et seq.* (Purdons Supp. 1989), and that its mandate is to serve the public interest of Pennsylvania rather than represent individuals, *Murphy,* 506 Pa. at 559, 486 A.2d at 393, it is equally probable that in limiting section 962(b) Pennsylvania decided that the PHRA was not an appropriate vehicle to ensure the protection of the congressional policies underlying federal civil rights claims. *C.f., Lukus,* 276 Pa. Super. at 269, 419 A.2d at 450-51.

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19. *See supra* pages 5-8.

IV. CONCLUSION

The court of appeals, familiar with application of Pennsylvania law, after careful review of applicable decisions of Pennsylvania appellate courts held that under *Lukus v. Westinghouse Electric Corp.*, 276 Pa. Super. 232, 419 A.2d 431 (1980), the exclusivity provision of the Pennsylvania Human Relations Act, 43 Pa. Cons. Stat. Ann. §962(b), does not preclude subsequent litigation of a claim arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000 e, *et seq.* There is no reason to disturb that determination. Similarly, there is no reason to use this case as a vehicle for re-examining the continuous line of decisions in this Court, and cases throughout the federal court system, holding that the Full Faith and Credit Statute, 28 U.S.C. §1738, requires that federal courts give the same preclusive effect to a prior state court decision as would be accorded that decision in another court of that state. Finally, Petitioner has raised no issue or argument that would justify this Court's entertaining of a claim that section 962(b) of the PHRA violates the Equal Protection Clause of the Fourteenth Amendment.

Respectfully submitted,

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